

No. 89-1493



In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Petitioner,

—against—

JOSEPH E. O'NEILL, et al.,

Respondents.

On Writ of Certiorari To The
United States Court of Appeals For The Fifth Circuit

PETITIONER'S REPLY MEMORANDUM ON PETITION FOR WRIT OF CERTIORARI

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April, 1990

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JOSEPH E. O'NEILL, *et al.*,

Respondents.

Reply Memorandum on Petition for Writ of Certiorari To The
United States Court of Appeals For The Fifth Circuit

Petitioner, Air Line Pilots Association International ("ALPA"), respectfully submits this reply memorandum in support of its request that writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit in *O'Neill, et al. v. Air Line Pilots Ass'n Intl.*, Fifth Cir. No. 88-2848 (Oct. 31, 1989).

Respondents' opposition brief presents five arguments why this Court should refuse to issue writ of certiorari. Only the first two points, both of which are arguments first raised in the brief in opposition, require any response.

First, relying on cases decided long before this Court's summary judgment trilogy announced in 1986, respondents argue that this Court should not issue a writ of certiorari because the Fifth Circuit's decision is interlocutory. Opposition Brief at 7. However, the legal questions presented by this litigation are precisely the type of controlling issues which are both "fundamental to the further conduct of the case" and of paramount public policy concern that warrant interlocutory review by this Court. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964). In this case, if the Fifth Circuit had reviewed the district court's decision to grant defendant summary judgment under the standard urged in the Petition, summary judgment would have been affirmed. Since the issue presented here is what standard should be applied, this legal question in a summary judgment context, together with the public policy concerns set forth in the Petition, presents the appropriate circumstance for interlocutory review.¹

Furthermore, respondents' argument that the issues presented by the Petition need not be decided, and will never have to be decided, if ALPA is "found guilty of discriminatory conduct" at trial is simply wrong. Opposition Brief at 7. The legal question of whether the Fifth Circuit's finding of possible discrimination conflicts with this Court's holdings in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), and *Trans World Airlines, Inc. v. Indep. Federation of Flight Attendants*, 109 S. Ct. 1225 (1989), is squarely presented in the Petition and justifies the granting of certiorari rather than remand for trial. Only if the different treatment of the pilots found in the order and

award (even if "intentionally" agreed to by the union) was the result of bad faith or hostility to some members of the unit, *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-338 (1953), or is inherently unlawful such as race discrimination, *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944), will a union's negotiating decision breach its duty of fair representation. Petition at 20. In all events, whether the allegations are of "discriminatory" or "arbitrary" conduct, this Court needs to articulate the appropriate standard under which the trier of fact must consider those allegations in a case involving union negotiating decisions.

Second, respondents argue that this Court's very recent decision in *Chauffeurs, Teamsters & Helpers Local 391 v. Terry*, 58 U.S.L.W. 4345 (1990), finally resolved the proper standard to be applied in all duty of fair representation cases. Opposition Brief at 8-9. In *Terry*, a case based on allegedly mishandled grievances, the Court determined that there is a right to a jury trial in a duty of fair representation action. The Court did not set forth what standard should be applied at trial to determine whether that duty was breached, nor was that question even presented or briefed. The Court merely recognized that the union's duty exists both in connection with bargaining with the employer and in connection with the pursuit of employee grievances. This Court did not hold in *Terry* that the standard set forth in *Vaca v. Sipes*, 386 U.S. 171 (1967), rather than the standard set forth in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), applies in a breach of the duty of fair representation case challenging a union's bargaining decisions. In fact, by determining that duty of fair representation plaintiffs have a right to a jury trial, the Court actually strengthened the need to define the proper standard to be applied by the lower courts in instructing juries and, as here, deciding whether there is any genuine issue of material fact to be presented to a jury.

1. In any event, none of the limitations on interlocutory review have any effect on the Fifth Circuit's direct conflict with decisions of this Court, as set forth in the Petition.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, petitioner respectfully prays that the Court issue writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit.

Dated: April 26, 1990

Respectfully submitted,

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